MOKHTAR HJ. JAMALUDIN

v.

PUSTAKA SISTEM PELAJARAN

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN J
[CIVIL SUIT NO. C 775 OF 1980]
13 MARCH 1985

COPYRIGHT: *Infringement of - Economic tort - Breach of contract - Damages - Damages at large - Principle of restitutio in integrum - Wounded feelings - Whether any damages for mental distress.*

The plaintiff had obtained with the consent of the defendants a declaration that he is the sole author and owner of the copyright in two literary works and an injunction restraining the defendants from selling by way of trade copies of the said literary works until the defendants had amended at their own expense all available copies of the said literary works. Damages were the only issue left.

Held:

[1] The plaintiff was entitled to damages for breach of contract as well as for infringement of his copyright in the said literary works under s. 14(3) of the Copyright Act, it being an economic tort.

[2] In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. In the case of an action for infringement, damages have been said to be at large and account may be taken of the motives and conduct of the defendants where they aggravate the injury done to the plaintiff. As such, the Court may award such sum as it thinks right to cover both the breach of contract and the tort.

[3] In the circumstances of the instant case, a conservative and less liberal assessment of RM2,500 was awarded.

[Judgment for plaintiff.]

Cases referred to:
Jarvis v. Swans Tours Ltd. [1973] 1 QB 233
Syed Alwi v. Dewan Bahasa & Pustaka [1980] 1 MLJ 129
Fenning Film Service v. Wolverhampton Cinemas [1914] 3 KB 1171
Exchange Telegraph Co. v. Gregory [1896] 1 QB 147
Rookes v. Barnard [1964] AC 1129

Legislation referred to:
Contracts Act 1950, s. 74
Copyright Act 1969, s. 14(3)

Other sources referred to:
Halsburys Laws of England, 3rd Edn., Vol. 11, p. 223
On Damages, McGregor, 14th Edn., p. 963

For the plaintiff - D.P. Naban; M/s. Skrine & Co.
For the defendants - C.T. Lee; M/s. Syarikat Lek Yan

JUDGMENT

Gunn Chit Tuan J:

Damages were the only issue left in this copyright infringement action by one Mokhtar Haji Jamaludin (the plaintiff), a writer of literary works writing under his own name and also under the pseudonym "Mokjamos". He had obtained the consent of Pustaka Sistem Pelajaran (the defendants), a firm of book publishers, for *inter alia*, a declaration that he is the sole author and owner of the copyright in two literary works entitled "Jalan Yang Berlubang" and "Ukuran Hati Mulia" (hereinafter referred to as "the said literary works") and an injunction to restrain the defendants whether by their partners, servants or agents from selling or continuing to sell by way of trade any copies of the said literary works until the defendants amend at their own expense all available copies of the said literary works.

According to the plaintiff (PW1) the said literary works were amongst thirty manuscripts which he had sent to the defendants. There was an oral agreement with the defendants' editor called Encik Alias sometime in late 1977 or early 1978 whereby in consideration of advance royalties of RM300 and an annual payment of royalty of 10 per cent of the retail sale price of each copy of the said literary works sold, the defendants were given a licence to publish and sell by way of trade to the public the said literary works. There was to have been a written agreement, but no such written agreement was made as the plaintiff was told by the defendants that "it would be signed later". However, in early 1980 the plaintiff discovered that the words "oleh Mokhtar A.K." were printed on the cover of the said literary works. But his pen-name was printed on the first sheet of the title page of the said literary works. As Mokhtar A.K. is also a writer the plaintiff complained that the intention of the defendants was to convey the idea that the said literary works were written by "Mokhtar A.K.". Although he did not know when the said literary works were published the plaintiff made a complaint to the defendants who then told him that the manuscripts were not his. The plaintiff also told the Court under cross-examination that although he agreed that there might be a mistake yet he felt upset and worried if the name of Mokhtar A.K. is used on his books. He also said that, unlike his other books, on the reverse side of the title page of each of the said literary works the name of the defendants was printed immediately after a letter 'C' within a circle which indicates that the ownership of the copyright belongs to the person whose name follows it.

Heng Soong Kong alias Michael Ong (DW1), the managing partner of the defendants, stated that their Encik Alias might have arranged to give the plaintiff royalties, but as far as he was concerned he was under the impression that once a sum of money had been paid the copyright would be assigned to them as in the case of all other writers. He said that the name "Mokhtar A.K." on the cover of the said literary works was a mistake made by their freelance artist. He did not realise the mistake until he received a letter from the plaintiff's solicitors in 1979 (Exhibit D4). There was no complaint prior to the receipt of D4. Under cross-examination he agreed that the cover of the said literary works shows that Mokhtar A.K. had written them. He admitted

that after discovering the mistake he did not take any steps to remedy it, and then also agreed that he had not entered into any agreement to purchase the copyright of the plaintiff and that it was wrong to put the words "Pustaka Sistem Pelajaran" after the symbol (C) in the said literary works as they have no claim to the copyright.

Mr. C.T. Lee, Counsel for the defendants, in a brief submission stated that there was no intention to cause a breach of the agreement, but assuming that there was a breach of the agreement the plaintiff had not discharged the onus of adducing evidence to prove that he had suffered damage. He then referred to s. 74 of the Contracts Act, 1950, on compensation for loss or damage caused by breach of contract and submitted that as the principle of *restitutio in integrum* applied the plaintiff's claim for damages should be dismissed.

Mr. Naban, Counsel for the plaintiff, pointed out that the feelings of the plaintiff had been hurt although there was no direct financial damage. He submitted that when wounded feeling was involved the principle of *restitutio in intergrum* no longer applied and contended that the plaintiff was entitled to exemplary damages after referring to the following paragraph at p. 223 in Vol. 11 of *Halsbury's Laws of England* (3rd. Edn.):

> Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant may be taken into consideration, the principle of *restitutio in intergrum* no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer.

Then after referring to the following passage in the judgment of Lord Denning MR in *Jarvis v. Swans Tours Ltd.* [1973] 1 QB 233, 237:

> What is the right way of assessing damages? It has often been said that on a breach of contract damages cannot be given for mental distress. Thus in *Hamlin v. Great northern Railway Co.* [1856] 1 H & N 408, 411 Pollock CB said that damages cannot be given "for the disappointment of mind occasioned by the breach of contract". And in *Hobbs v. London & South Western Railway Co.* [1875] LR 10 QB 111, 122, Mellor J said that:
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> > for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages.
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> The Courts in those days only allowed the plaintiff to recover damages if he suffered physical inconvenience, such as having to walk five miles home, as in Hobbs case: or to live in an over-crowded house. *Bailey v. Bullock* [1950] 2 All Er 1167.

> I think that those limitations are out of date. In a proper case damage for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach. I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities.

Counsel referred to *Syed Alwi v. Dewan Bahasa & Pustaka* [1980] 1 MLJ 129 which is a local case involving the infringement of copyright in which Vohrah J ordered *inter alia,* the defendants to pay damages to the plaintiff in the sum of RM10,000. Counsel then suggested that the defendants ought to pay the plaintiff damages in the sum of RM5,000.

In this case the plaintiff was entitled to damages for breach of the agreement, albeit an oral one, as well as infringement by the defendants of his copyright in the said literary works. *(Fenning Film Service v. Wolverhampton Cinemas* [1914] 3 KB 1171, 1174). Thus s. 14(3) of the Copyright Act, 1969, gives an owner of a copyright a remedy for the infringement of his copyright, which has these days come to be known as one of the economic torts (see *McGregor on Damages* (14th. Edn.) at p. 963), and is as follows:

> Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright; and in any actions for such an infringement all such relief, by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights.

For the assessment of damages caused by the breach of the agreement I agreed with Counsel for the defendants that compensation cannot be given for any remote and indirect loss or damage sustained by reason of the breach of the agreement. But here the plaintiff was also entitled to damages for infringement of his copyright in the said literary works, and in an action for infringement of copyright the damages have been said to be at large, i.e. not limited to the pecuniary loss that can be specifically proved, and the Courts have consistently endorsed Lord Esher MR's pronouncement in *Exchange Telegraph Co. v. Gregory* [1896] 1 QB 147, 153, that " it is not necessary to give proof of special damage" because "the damages are damages at large". And in cases where the damages are at large a jury in England (or the Judge if the award is left to him) can take into account the motives and conduct of the defendants where they aggravate the injury done to the plaintiff, and where the plaintiff's proper feelings of dignity and pride have been injured aggravated damages may be awarded *(Rookes v. Barnard* [1964] AC 1129 at 1225 per Lord Delvin).

In our present case when Counsel for the plaintiff suggested that damages should be assessed at RM5,000 I think that he realised that the plaintiff, with respect, was not in the same class of writers as the Syed Alwi who had sued Dewan Bahasa & Pustaka. But as damages are at large and in the words of Horridge J in *Fenning Film Service v. Wolverhampton Cinemas:*

therefore I can give what amount I think right as if I was a jury... to cover both the breach of contract and the tort.

In all the circumstances of this case, I considered that I should be conservative and less liberal in my assessment of damages and therefore awarded the plaintiff damages in the sum of RM2,500 only.

Also found at [1985] 2 CLJ 51